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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
(HOUSTON DIVISION)

MARK NEWBY, Plaintiff, v. ENRON CORP. et al., Defendants.	:	Civil Action No. H-01-3624 (Securities Suits)
	:	Consolidated with: H-01-3630; H-01-3647; H-01-3652; H-01-3660; H-01-3670; H-01-3671; H-01-3681; H-01-3682; H-01-3686; H-01-3717; H-01-3733; H-01-3734; H-01-3735; H-01-3736; H-01-3737; H-01-3789; H-01-3838; H-01-3839; H-01-3889; H-01-3903; H-01-3914; H-01-3993; H-01-4009; H-01-4071; H-01-4106; H-01-4168; H-01-4189; H-01-4198

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PIRELLI ARMSTRONG TIRE CORPORATION RETIREE MEDICAL BENEFITS TRUST, Derivatively On Behalf of ENRON CORPORATION,	:	Civil Action No. H-01-3645 (Derivative Suits)
Plaintiffs,	:	
v.	:	Consolidated with: H-01-3690; H-01-3892; H-01-3995; H-01-3996; H-01-3997; H-01-3998; H-01-4108;
KENNETH L. LAY, et al.,	:	
Defendants,	:	
-and-	:	
ENRON CORPORATION, an Oregon Corporation,	:	
Nominal Defendant	:	

PAMELA M. TITTLE, et al., on behalf of herself and a class of persons similarly situated,	:	Civil Action No. H-01-3913 (ERISA suits)
Plaintiffs,	:	
v.	:	Consolidated with: H-01-4063; H-01-4089; H-01-4125; H-01-4128; H-01-4150; H-01-4208; H-01-3940
ENRON CORP., an Oregon corporation, et al.,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR APPOINTMENT OF LEAD PLAINTIFF AND FOR SELECTION OF LEAD COUNSEL AND CO-COUNSEL

Plaintiff Victor Ronald Frangione and proposed lead plaintiffs, Anthony P. Davidson and Seymour Nebel (the "Davidson Group" or "Proposed Lead Plaintiff") submit this Memorandum of Law in support of their motion for entry of an order: (1) appointing the Davidson Group to serve as lead plaintiff in the above-captioned securities fraud class action (hereinafter, the

"Action"); and (2) approving the Davidson Group's selection of lead counsel and co-counsel to represent the putative class in the Action.

I. INTRODUCTION

On November 9, 2001, plaintiff Frangione filed his securities class action seeking to recover damages for violations of sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission ("SEC") [17 C.F.R. § 240.10b-5] (the "Frangione Action"). The Frangione Action asserts claims on behalf of all persons or entities who purchased or otherwise acquired the securities of Enron Corp. ("Enron" or the "Company") during the period of January 18, 2000 through October 17, 2001 (the "Class Period"), and who were damaged thereby (the "Class"[1]). (Compl. ¶ 1)[2]. At least twenty-eight substantially similar securities fraud class actions have been brought pursuant to sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5, as well as eight securities fraud actions brought on behalf of Enron employees who held stock in the Company's 401K or retirement plan. These actions have subsequently expanded the Class Period to October 22, 1998 through November 30, 2001. The Court has consolidated the Frangione Action with the federal securities cases. In addition, at

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[1] Excluded from the Class are defendants, members of the immediate family of each of the individual defendants in this Action, any subsidiary of affiliate or Enron and the directors, officers and employees of Enron or its subsidiaries or affiliates, or any entity in which any excluded person has a controlling interest, and the legal representatives, heirs, successors and assigns of any excluded person. (Compl. ¶ 13)

[2] All "¶" citations are to the "Class Action Complaint for Violations of Federal Securities Law" filed on November 9, 2001 in the action, *Frangione v. Enron Corp., et al.,* C. A. No. H-01-3889.

least eight derivative actions have been filed nominally on behalf of the Company. On December 12, 2001, the Court separately consolidated three groups of actions: (1) the securities fraud cases; (2) the employee benefit plan (401K) cases; and (3) the derivative cases.

The various actions generally have been brought against Enron, Kenneth L. Lay ("Lay"), the current Chairman of the Board and Chief Executive Officer of Enron, Jeffrey K. Skilling ("Skilling"), the Chief Executive Officer of Enron from January 2001 until his resignation on August 14, 2001, and President and Chief Operating Officer of Enron from January 1997, and Andrew S. Fastow ("Fastow"), the Chief Financial Officer of Enron during the relevant period. (See Complaint ¶ 8). Numerous other defendants have been named in various pending cases, including other officers and directors of Enron, Enron's auditors, Arthur Andersen, LLP, and certain other related entities. On November 25, 2001, defendant Enron filed for bankruptcy protection under Chapter 11.

Pursuant to the Exchange Act, as amended by Congress in the Private Securities Litigation Reform Act of 1995 (hereinafter, the "PSLRA"), courts are required to appoint a lead plaintiff in any class action seeking recovery pursuant to the Exchange Act. As detailed more fully infra, the PSLRA provides procedures for the courts to follow when selecting the lead plaintiff in a federal securities class action. Among these procedures are certain filing and early-notice requirements, along with a rebuttable presumption stating that the "most adequate" plaintiff to represent the class in such an action is the plaintiff (or group of plaintiffs) who has filed a complaint or motion in response to a notice, has suffered substantial financial loss due to the alleged securities fraud, and who has satisfied particular requirements of Rule 23 of the Federal Rules of Civil Procedure ("FRCP").

Proposed Lead Plaintiff, two individual investors in Enron stock, herein meets the PSLRA's parameters for lead plaintiff appointment, and therefore their motion should be granted. The PSLRA's filing and early-notice requirements have been satisfied; in addition, Proposed Lead Plaintiffs have suffered a substantial financial loss from their investments in Enron securities during the Class Period[3], and Proposed Lead Plaintiffs meet the requisite typicality and adequacy requirements of Rule 23 of the Federal Rules of Civil Procedure ("FRCP"), as their claims are representative of all claims brought for all classes of securities included in the related actions filed against Enron and related persons.

Further, and pursuant to the PSLRA, provided this Court grants Proposed Lead Plaintiffs' motion for the appointment of Zwerling, Schachter & Zwerling, LLP and Federman & Sherwood as lead counsel and co-counsel, respectfully, should be approved.

II. SUMMARY OF ACTION

In the consolidated securities cases, each allege substantially the same claims against Enron Corp. and its officers, on behalf of persons who purchased Enron securities during the Class Period (the "Class Actions").[4] In addition, at least nine derivative actions, nominally on behalf of Enron, have also been filed (the "Derivative Actions").

All of the Class Actions allege claims for violation of §§ 10(b) and 20(a) of the Exchange Act and SEC Rule 10b-5 promulgated thereunder (17 C.F.R. §240.10b-5) on behalf of investors

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[3] As a result of Enron's bankruptcy filing, its stock is now trading at approximately 40 cents per share. Accordingly, the investments of each member of the Davidson Group are now virtually worthless.

[4] There are also several actions filed in the Eastern District of Texas and various other actions filed in State Court in Oregon and Texas.

who bought Enron securities during the Class Period. At least one action, *Amalgamated Bank, as Trustee for the Longview Collective Investment Fund, et al., v. Lay, et al.* asserts claims under the Securities Act of 1933 (the "Securities Act") 15 U.S.C., §77 et seq. The derivative cases have been brought nominally on behalf of Enron and assert claims against various officers and directors for improper conduct and breach of their duties to stockholders.

On November 29, 2001, certain defendants moved to consolidate all of the class, employee benefit cases and derivative actions filed in this Court and, on December 12, 2001, the Court issued an order separately consolidating the securities cases, the employee benefit plan cases and the derivative actions.

III. SUMMARY OF ALLEGATIONS

Enron provides, through various subsidiaries and affiliates, natural gas, electricity and communications products and services to wholesale and retail customers. The principal Enron businesses involve: transportation of natural gas through pipelines; the generation, transmission and distribution of electricity; the marketing of natural gas, electricity and other commodities and related risk management and finance services; the development, construction and operation of power plants, pipelines and other energy related assets; the delivery and management of energy commodities and capabilities to end-use retail customers in the industrial and commercial business sectors; and the development of an intelligent network platform to provide bandwidth management services and the delivery of high bandwidth communication applications. Through Azurix Corp. ("Azurix"), Enron owns, operates and manages water and waste water assets and provides water and waste water related

services. (Compl. ¶ 7)

Proposed Lead Plaintiff seeks to represent shareholders who purchased Enron securities during the relevant Class Period, and who were injured thereby. Plaintiffs allege that during the Class Period, Enron and defendants Lay, Skilling, and Fastow ("the "Individual Defendants") (collectively, the "Defendants") violated sections 10(b) and 20(a) of the Exchange Act, and SEC Rule 10b-5, by disseminating in documents, press releases, SEC filings and other statements to the investing public, materially false and misleading information regarding the Company's business, financial condition, and financial results. (Compl. ¶¶ 11, 13-78). Defendants participated in a broad-ranging fraudulent scheme and course of business that operated as a fraud or deceit on purchasers of Enron securities. Defendants' conduct: (a) deceived the investing public regarding the business, finances and value of Enron's assets and common stock; and (b) caused plaintiffs and other members of the Class to purchase Enron common stock at artificially inflated prices. (Compl. ¶ 11). As part of the scheme, defendant Fastow and certain other Enron management employees engaged in a series of related party transactions with private limited partnerships in order to personally profit at the expense and to the detriment of Enron. (Compl. ¶ 10, 19-28). Moreover, throughout the Class Period, Defendants issued financial statements that violated Generally Accepted Accounting Principles ("GAAP") and SEC Rules[5]. (Compl. ¶¶ 60-61).

With regard to the "related party transaction" portion of Defendants' scheme, Enron

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[5] Among the GAAP violations committed by Defendants in financial statements published in press releases, Forms 10-Q, 10-K, Proxy Statements and other SEC filings, was the improper recognition of revenues from transactions involving limited partnerships with related parties and other off-balance sheet deals, the overstatement of assets, and the failure to fully disclose the relationships and transactions involving the limited partnerships. (Compl. ¶¶ 62-63)

entered into a series of transactions between 1999 and the first half of 2001 with private investment companies LJM Cayman, L.P. ("LJM1") and with LJM2 Co-Investment, L.P. ("LJM2"), while defendant Fastow, Enron's Chief Financial Officer, was the "managing member" LJM1's and LJM2's general partner. (Compl. ¶¶ 19, 23). These transactions included, among other dealings, amending forward contracts resulting in Enron having contracts to purchase shares of Enron common stock at certain prices, LJM1 and/or LJM2 acquiring various debt and equity securities of certain Enron subsidiaries and affiliates and paying Enron approximately $119.3 million pursuant to the transactions, and LJM2 selling to Enron certain merchant investment interests for a total consideration of approximately $76 million. (Compl. ¶¶ 21-28). Furthermore, under the partnership arrangements, LJM1 and LJM2's general partner (of which Fastow was the managing member) was entitled to receive an enormous percentage of the profits of the partnerships. And indeed, Fastow and other Enron management employees did receive millions in profits and fees generated by the partnerships. (Compl. ¶¶ 20, 23).

Over the period of financial dealings with LJM1 and LJM2, Defendants failed to disclose to the investing public the true nature of the related party transactions, including the personal profits being realized by Fastow and others, and including the serious risks to Enron's capitalization resulting from partnership transactions. (Compl. ¶ 58). Defendants also failed to disclose the enormous conflict of interests in which defendant Fastow and other management employees were entangled, as these management employees stood to reap huge financial rewards, often to the Company's detriment, as a result of their participation in LJM transactions. (Compl. ¶ 57).

On October 16, 2001, some of the financial problems plaguing Enron started becoming

known to investors with the announcement of a charge of over $1 billion for certain assets Enron had written down. (Compl. ¶ 51). However, Enron's October 16, 2001 press release failed to disclose not only the prior false financial statements, but the massive reduction of $1.2 billion in shareholder equity (to $9.5 billion) that had occurred as a result of unwinding of transactions with the LJM partnerships (which had taken place earlier in the year). (Compl. ¶ 53). Only later that day, in a conference call with analysts and investors, did defendant Lay briefly mention that the Company's equity position had been reduced to $9.5 billion—a reduction in the Company's value of over $1.2 billion—significantly changing the Company's capitalization and debt-to-equity ratios. (Compl. ¶ 52).

Over the next three days, Enron's stock price fell from $33.84 to $26.05 on heavy volume, and in the days following Enron's October 16, 2001 press release, additional negative disclosures were made to the market regarding Enron's financial condition and business. As a result of these continuing disclosures, by November 7, 2001, Enron's stock price had fallen to just over $9 per share. (Compl. ¶¶ 53, 56).

However, the full scope of the accounting fraud at Enron was still unknown. In the weeks following the initial disclosures of October 16, 2001, the enormity of Enron's fraudulent practices become known to the investing public, including a restatement of its financial statements back to 1997, eliminating over $600 million in previously reported earnings. Finally, on November 25, 2001, Enron declared bankruptcy and filed for reorganization under Chapter 11. In the aftermath its stock traded as low as 27 cents per share. The enormity of Enron's financial collapse has triggered investigations by both the SEC and Congress, among others, into the Company's alleged misconduct.

During the Class Period, defendants personally profited from Enron's issuance of misleading financial statements. Defendant Skilling sold at least 448,668 shares of Enron common stock for total proceeds of more than $32.48 million; defendant Lay sold over 657,108 shares of Enron common stock for proceeds of more than $34.44 million; and defendant Fastow sold at least 52,080 shares of Enron common stock for proceeds of more than $4.32 million. (Compl. ¶ 79) Numerous other insiders sold millions of dollars in Enron shares to the unsuspecting public.

In addition, defendant Fastow (and others) realized millions of dollars of personal profits as a result of Enron's transactions with the LJM partnerships. In 2000, LJM2, Fastow and certain other Enron management, realized more than $7 million in management fees and about $4 million in capital increases for their investments in LJM2. (Compl. ¶ 80)

IV. ARGUMENT

A. Pursuant to the Exchange Act and the PSLRA, the Court Should Appoint the Davidson Group as Lead Plaintiff

As amended by the PSLRA, the Exchange Act sets out a framework for appointment of lead plaintiff in "each private action arising under [the Exchange Act] that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure." PSLRA §§ 21D(a)(1), 15 U.S.C. § 78u-4(a)(1). Because the Davidson Group meets the requirements set forth in the PSLRA, including being the "most adequate plaintiff" as defined by PSLRA § 21D(a)(3)(B)(iii), 15 U.S.C. § 78u-4(a)(3), it should be appointed to serve as lead plaintiff for the Class.

1. Proposed Lead Plaintiff Meets the Prerequisite and Timing Requirements for Lead Plaintiff Appointment

The Exchange Act, as amended by the PSLRA, mandates that within twenty days after the

date on which a class action is filed:

> [T]he plaintiff or plaintiffs shall cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class–
>
> (I) of the pendency of the action, the claims asserted therein, and the purported class period; and
>
> (II) that, not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class.

15 U.S.C. § 78u-4(a)(3)(A)(i).[6] Furthermore, the PSLRA's early-notice requirement states:

> If more than one action on behalf of a class asserting substantially the same claim or claims arising under this title is filed, only the plaintiff or plaintiffs in the first filed action shall be required to cause notice to be published in accordance with clause (i).

15 U.S.C. § 78u-4(a)(3)(A)(ii).

Here, on October 22, 2001, plaintiff in the action entitled *Newby v. Enron Corp., et al.*, C.A. No. H-01-3624 (the "Newby Action") filed the first complaint asserting securities fraud allegations that underpin each of the securities cases consolidated before the Court. Thereafter, the Newby Action plaintiff published, on October 22, 2001, a notice of pendency of the action over the PR Newswire (the "Newby Notice"). (See Exhibit A, annexed hereto). The Newby Notice was published within the requisite twenty days, in keeping with Section 21D(a)(3)(A)(i) of the Exchange Act, 15 U.S.C. § 78u-4(a)(3)(A)(i), and it adequately advised the purported class

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[6] Section 21D of the PSLRA also directs the court to consider any motions to appoint lead plaintiffs no later than ninety (90) days after the date of the notice's publication, or as soon as practicable after the court decides any pending motion to consolidate any actions asserting substantially the same claim or claims. 15 U.S.C. § 78u-4(a)(3)(B).

members of the lawsuit's claims, of the purported class period, and of class members' right to move the court for lead plaintiff appointment within the sixty-day limit. See *Tarica v. McDermott Int'l, Inc.*, 2000 WL 377817, at *2-3 (E.D. La. 2000); see also *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 477 fn.1 (5th Cir. 2001); *Netsky v. Capstead Mortgage Corp.*, 2000 WL 964935, at *2 (N.D. Tex. 2000).

Subsequently, in accordance with Section 21D(a)(3)(A)(i)(II) of the Exchange Act, 15 U.S.C. § 78u-4(a)(3)(A)(i)(II), Proposed Lead Plaintiff filed the present motion on December 21, 2001, within sixty days after the publication of the first-filed notice on October 22, 2001 (See Ex. C.). See id. Thus, the Notice provision of the PSLRA has been satisfied.

2. Proposed Lead Plaintiff is the Most Adequate Plaintiff Under the Exchange Act Standards

The Exchange Act, as amended by the PSLRA, sets forth standards for the court to follow when determining which class member or members will "most adequately" represent a class' interests, and who therefore should be appointed Lead Plaintiff. Section 21D of the PSLRA states, inter alia:

> [T]he court shall adopt a presumption that the most adequate plaintiff in any private action arising under this title is the person or group of persons that -
>
> (aa) has either filed the complaint or made a motion in response to a notice under subparagraph (A)(i);
>
> (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and
>
> (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(i)(aa), (bb), (cc).

In the instant matter, Proposed Lead Plaintiff meets the "most adequate plaintiff" requirements fully, and thus presumptively is the most adequate plaintiff.

a. Proposed Lead Plaintiff Has Moved for Appointment as Lead Plaintiff in Response to a Notice

Each of the two members of the Davidson Group have signed and filed a certification stating that they have reviewed the complaint in the action and are willing and able to serve as the Class' lead representative. (See Ex. B, annexed hereto). Further, with this motion, filed in response to the Newby Notice issued on October 22, 2001, Proposed Lead Plaintiff seeks appointment as Lead Plaintiff for the Class. Thus, the Davidson Group has fulfilled the first requirement of the "most adequate plaintiff" standard by making a proper motion in response to a notice.

b. Proposed Lead Plaintiff Has a Significant Financial Interest in the Relief Sought by the Class

The financial collapse of Enron has triggered a series of lawsuits involving a myriad of differing investor interests. Not only have actions been brought by numerous shareholders, but they have been brought on behalf of Enron's employee investors and derivatively on behalf of the Company. In the wake of this financial disaster, the personal financial impact on small investors cannot be ignored. Indeed, the perpetration of the alleged fraud on thousands of individual investors has in many cases devastated their individual portfolios and investment accounts. Thus, it is entirely appropriate for individual investors, who have lost significant portions of their investment portfolios, to be appointed lead plaintiffs. As the Court recognized in *Oxford Health Plans Sec. Litig.* 182 F.R.D. 42 (S.D.N.Y. 1998), various lead plaintiffs may be appointed to represent differing interests. Appointing a representative for individual plaintiffs

fulfills the underlying policy of making certain that individual investors who suffered significant personal losses, have a role in the litigation. Here, the Davidson Group proposes that they be appointed lead plaintiff to represent those investor interests. Given the scope and magnitude of this case, where over $70 billion in market capitalization disappeared, it is entirely appropriate for individual investors to have a voice in any lead plaintiff structure.

Within the Davidson Group, Anthony Davidson purchased 3,000 shares of Enron common stock for a total of $63,250. (Ex. B). Seymour Nebel purchased 1,000 shares of Enron common stock for a total of $66,793.50 (Ex. B). Each of their investments are now virtually worthless.

Proposed Lead Plaintiff believes that the magnitude of its financial interest in the relief sought by the Class in the various class action lawsuits filed against Enron and related persons is significant and, on a personal financial level, each member of the Davidson Group believes it has a substantial interest in maximizing both their recovery and the recovery for the class.

Therefore, Proposed Lead Plaintiff satisfies the second requirement of the "most adequate plaintiff" standard, and is thus entitled to lead plaintiff appointment. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(i)(bb).

c. Proposed Lead Plaintiff Satisfies the Requirements of Rule 23 of the Federal Rules of Civil Procedure

Rule 23(a) of the Federal Rules of Civil Procedure ("FRCP") states that a party may act as a class representative if the following four requirements are satisfied:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the

> representative parties will fairly and adequately protect the interests of the class.

However, "[f]or purposes of appointing lead plaintiffs, a wide-ranging analysis under Rule 23 is not appropriate[.]" *In re Reliance*, 1998 WL 388260, at *4 (W.D. Tex. June 29, 1998); see *In re Milestone Scientific Sec. Litig.*, 1998 WL 846617, at (D.N.J. Oct. 22, 1998). Instead, at the lead plaintiff motion stage, a proposed lead plaintiff need only make a preliminary showing that he meets the typicality and adequacy requirements. See *In re Waste Management, Inc.*, 128 F.Supp.2d 401 (S.D. Tex. 2000) ("[T]he inquiry at this stage of the litigation in determining the Lead Plaintiff is not as searching as the one triggered by a subsequent motion for class certification, the proposed Lead Plaintiff must make at least a preliminary showing that it has claims that are typical of those of the putative class and the capacity to provide adequate representation for those class members."); see also *In re Oxford Health Plans Sec. Litig.*, 182 F.R.D. 42, 49-50 (S.D.N.Y. 1998) ("Typicality and adequacy of representation are the only provisions relevant to a determination of lead plaintiff under the PSLRA.") (citing *Gluck v. CellStar Corp.*, 976 F. Supp. 542, 546 (N.D. Tex. 1997)); and *Tarica*, supra, 2000 WL at *4. Moreover, the PSLRA states that the "most adequate plaintiff" presumption may be rebutted only upon proof that this plaintiff "(aa) will not fairly and adequately protect the interests of the class; or (bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

i. *Proposed Lead Plaintiff Satisfies the Typicality Requirement of Rule 23*

The typicality requirement of Rule 23(a)(3) is satisfied where each class member's claim arises from the same course of conduct, and where each class members' claims are based on the same legal theory. See *In re Waste Management*, 128 F.Supp.2d at 411 ("Typicality is achieved where the named plaintiffs' claims arise 'from the event or course of conduct that gives rise to claims of other class members and the claims are based on the same legal theory.'") (quoting *Longden v. Sunderman*, 123 F.R.D. 547, 556 (N.D. Tex. 1988)); *Tarica*, 2000 WL at *4 ("Under Rule 23(a), typicality is satisfied when the claims or defenses of the representative parties are typical of the claims or defenses of the class") (internal quotations and citation omitted); *Mullin v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999) (where the Fifth Circuit held that "the test for typicality is not demanding. It focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent.") (internal quotations and citation omitted)

Proposed Lead Plaintiff, like the other punitive Class members, purchased Enron shares or securities on the open market during the Class Period, and were damaged by Defendants' alleged violations of Sections 10(b) and 20(a) of the Exchange Act, and SEC Rule 10b-5. Proposed Lead Plaintiff's legal claims are typical of the claims made by all Class members, as Proposed Lead Plaintiff's claims and other Class members' claims arise from the same course of events and are based upon the same legal theory.

Further, many questions of law and fact are common to the putative Class members and such questions predominate over questions that may affect individual claims. Such "common"

questions of law and fact include:

(a) whether the Federal securities laws were violated by Defendants' alleged acts and omissions;

(b) whether Enron during the Class Period disseminated false and misleading statements to the investing public and the Company's shareholders regarding the Company's business, financial condition, prospects, operations, and true valuation of its assets;

(c) whether the Individual Defendants named in this Action caused Enron to disseminate false and misleading financial statements during the Class Period;

(d) whether Defendants acted with the requisite state of mind when disseminating, or causing Enron to disseminate, false and misleading financial statements during the Class Period;

(e) whether the market price of Enron's securities during the Class Period were artificially inflated as a result of Defendants' material misrepresentations and omissions of material facts to the investing public; and

(f) whether the Class members have suffered damages and, if so, what represents the proper measure thereof.

Thus, Proposed Lead Plaintiff and all of the putative Class members allege substantially similar and uniform claims based upon a securities fraud perpetrated upon them by Enron. The typicality prong of the Rule 23(a) test is satisfied, as the Davidson Group's claims are premised upon the same legal theory that underlies the claims made by other Class members, and all claims alleged "arise out of the same alleged material misrepresentations by defendants, and they all claim damages as a result." *Tarica*, 2000 WL at *4.

ii. *Proposed Lead Plaintiff Satisfies the Adequacy Requirements of Rule 23*

The adequacy requirement is satisfied where the plaintiff's interests are not antagonistic to the interests of the proposed Class members, and where the plaintiff has the ability to actively prosecute the action through qualified, experienced attorneys. See *Netsky v. Capstead Mortgage* Corp., 2000 WL 964935 (N.D. Tex. 2000) ("In determining whether one can adequately represent the interest of the class, the court considers the Plaintiff's ability to vigorously prosecute the class claims and an absence of conflict or antagonism between the interests of the named plaintiffs and the interest of the class'); *Tarica*, 2000 WL at *5 (same)

Here, it is evident that Proposed Lead Plaintiff's interests parallel the absent Class members' interests and that no antagonism exists between those sets of interests. As explained previously, Proposed Lead Plaintiff's legal claims share similar questions of law and fact with the other Class members' claims, and Proposed Lead Plaintiff's claims are typical of the Class members' claims. Additionally, Proposed Lead Plaintiff has already undertaken significant steps that evidence his eagerness to protect the interests of the Class: each of the two members of the Davidson Group has executed a certification expressing interest in serving as a class representative in this action, Proposed Lead Plaintiff has filed the initial motion requesting lead plaintiff appointment, and Proposed Lead Plaintiff has retained counsel that are experienced in the prosecution of complex securities fraud class actions. Notably, the Davidson Group's proposed lead counsel are highly-qualified and experienced, and said counsel has been adjudged adequate class counsel in numerous securities fraud class actions. (A copy of Proposed Lead Counsel's firm resume is attached as Ex. C.).

Therefore, Proposed Lead Plaintiff fulfills the necessary requirements of Rule 23 and should be named Lead Plaintiff in this lawsuit.

B. THE DAVIDSON GROUP'S CHOICE OF LEAD COUNSEL ARE EXPERIENCED AND QUALIFIED AND SHOULD BE APPROVED BY THE COURT

Under the Exchange Act, as amended by the PSLRA, a proposed lead plaintiff has the right to independently select and retain class counsel, subject to the court's approval. See 15 U.S.C. § 78u-4(a)(3)(B)(v). Additionally, the court should not interfere with the proposed lead plaintiff's selection of counsel unless it is "necessary to protect the interests of the plaintiff class." See H.R. Conf. Rpt. No. 104-369, at 19 (1995). In the instant matter, Proposed Lead Plaintiff has chosen Zwerling, Schachter & Zwerling, LLP (the "Zwerling Firm") to serve as lead counsel for the Class. The Zwerling Firm has vast and varied experience in handling complex class actions and securities fraud cases, as detailed in the attached firm resume. (See Ex. C). The law firm has successfully prosecuted securities class actions for more than a decade, and has recovered millions of dollars for injured shareholders. (See Ex. C).

C. THE DAVIDSON GROUP'S CHOICE OF CO-COUNSEL ARE EXPERIENCED AND QUALIFIED AND SHOULD BE APPROVED BY THE COURT

Proposed Lead Plaintiff also seeks court approval of Federman & Sherwood as co-counsel for the Class. Courts may appoint co-counsel to assist lead counsel and to act as liaison counsel so as to coordinate complex litigation involving multiple parties who possess similar interests, but different counsel. *Manual for Complex Litigation (Third)*, § 20.221 at 26-27 (1995). Liaison counsel is:

> charged with essentially administrative matters, such as communications between the

> court and other counsel..., convening meetings of counsel, advising parties of developments in the case, and otherwise assisting in the coordination of activities and positions. Such counsel may act for the group in managing document depositories and in resolving scheduling conflicts. Liaison counsel will usually have offices in the same locality as the court.

Id. at 27.

The court should carefully assess the qualifications of law firms that are candidates for the liaison counsel position. *Id.*, § 20.224 at 30. In the instant matter, Proposed CO-Counsel Federman & Sherwood possesses significant class action lawsuit expertise and experience. See Ex. D. Clearly, Federman & Sherwood will be able to successfully perform all of the duties required of liaison and co-counsel.

VI. CONCLUSION

For the foregoing reasons, Proposed Lead Plaintiff, the Davidson Group, respectfully requests that this Court: (1) appoint the Davidson Group as Lead Plaintiff for the above-captioned securities fraud class action; and (2) approve Proposed Lead Plaintiffs' selection of Zwerling, Schachter & Zwerling, LLP as lead counsel for the Class and its selection of Federman & Sherwood as co-counsel counsel.

Dated: December 20, 2001

Respectfully submitted,
FEDERMAN & SHERWOOD

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CERTIFICATE OF SERVICE

On this 20th day of December, 2001, a true and correct copy of the above and foregoing was served by First Class mail to all parties listed on the attached Service List.

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